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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUL 15 1996
FEDERAL
COMMUNICATIONS
COMMISSION
OFFICE OF SECRETARY

In the Matter of

Revision of Part 22 and
Part 90 of the Commission's
Rules to Facilitate Future
Development of Paging
Systems

WT Docket No. 96-18

Implementation of
Section 309(j) of the
Communications Act--
Competitive Bidding

PP Docket No. 93-253

To: The Commission

COMMENTS ON PETITION FOR RECONSIDERATION

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ProNet Inc. ("ProNet"), through its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby comments on a petition for reconsideration ("Petition") of the First Report and Order (the "R&O")^{1/} filed by Metrocall, Inc. ("Metrocall") in the above-captioned rulemaking proceeding ("NPRM").

^{1/} The *R&O* was released April 23, 1996, and was published in the *Federal Register* on May 9, 1996. The petitions for reconsideration were announced in the Commission's *Public Notice*, Report No. 2139, released June 25, 1996, and were published in the *Federal Register* on June 28, 1996. On June 11, 1996, the Commission released an *Order on Reconsideration of First Report and Order*; this "*Reconsideration Order*" did not, however, address the issues discussed herein.

I. INTRODUCTION

In the R&O, the Commission partially lifted its freeze on paging applications by (1) permitting incumbent licensees to construct and operate additional transmitters without Commission approval or notification, provided there is no increase in existing composite interference contours; (2) allowing incumbents to apply for additional facilities located within forty miles of a site authorized on or prior to February 8, 1996 (the "Freeze Date"); and (3) resuming processing applications filed with the Commission prior to the Freeze Date.

In its own Petition for Partial Reconsideration of the R&O, ProNet requested that the Commission:

- Enable forty mile expansion applications to be based upon licenses for which applications were pending as of the Freeze Date;
- Strictly limit the right to "MX" forty mile expansion applications to co-channel incumbents with operations in the same or contiguous area as proposed in the expansion application;
- Allow applicants to resolve mutual exclusivity under existing rules; and
- Allow permissive modifications where no valid "MX" application could be filed, or where sites are "lost" due to circumstances beyond the licensee's control.

ProNet continues to advocate these modifications to the R&O. Metrocall's Petition, however, raises additional issues which warrant the Commission's immediate attention. As discussed herein, ProNet strongly urges the Commission to adopt Metrocall's proposals to:

- Confirm that the Commission will accept Form 489 notifications for "fill-in" sites added under the interim licensing rules;
- Allow permissive modifications, including addition of "fill-in" transmitters, by shared PCP licensees;
- Adopt a uniform 30 day Public Notice period for all Part 22 applications, including 931 MHz; and

- Confirm that assignees and transferees are entitled to 40 mile expansion rights from their acquired facilities.

II. NOTIFICATION OF PERMISSIVE "FILL-IN" SITES

Like Metrocall, ProNet is concerned that the Commission staff is actually discouraging filing of Form 489 notifications for permissive "fill-in" transmitters during the interim licensing period. Notification via FCC Form 489 enables licensees to obtain additional protection for new transmitters, and to facilitate resolution of prospective interference disputes caused by fill-ins.

Protection of Fill-In Transmitters-- In the rapidly changing regulatory and business environment typifying today's paging industry, licensees critically need to obtain specific interference protection for internal sites, notwithstanding the implicit protection provided by co-channel perimeter sites. Existing sites may be lost due to terminated leases; new construction may render a site impractical; and changes in the subscriber base may require termination or relocation of perimeter sites. Moreover, under the anticipated geographic licensing regime, incumbent systems which currently overlap geographic areas may be sold and/or divided between geographic licensees.^{2/} In such cases, a site initially constructed on a permissive basis may become a perimeter site, but will lack interference protection unless a Form 489 is filed and the site is added to the corresponding system license

^{2/} Further, although licensees have assisted the Commission in updating its station records, authorized sites are still occasionally omitted from station licenses and the Commission's database due to human error.

Interference Caused By Fill-Ins-- By permitting service contour expansion of licensed sites without prior agency authorization,^{3/} the interim criteria increase the need for Commission files to depict actual operations accurately. Depending on operational power levels and geographic factors, interference to adjacent co-channel operations is possible, even if the interfering transmitter's existing interference contour is constant.^{4/} Identifying the source of such interference will become substantially more difficult if station records are less than completely accurate.

In the Part 22 Rewrite, the Commission responded to these concerns by explicitly affording licensees the discretion to file notifications for fill-in transmitters.^{5/} No basis exists for discontinuing this practice; indeed, the advent of geographic licensing increases incumbent licensees' incentives in ensuring that the Commission's official records accurately depict their coverage so that a geographic co-licensee has full and explicit notice regarding the feasibility of satisfying its construction requirements.^{6/} The Commission should therefore clarify that

^{3/} In the *NPRM* (at ¶140), the Commission eliminated-- for the interim period-- the Section 22.165(d) requirement that fill-in transmitter *service* contours be wholly within existing composite service contours.

^{4/} Depending on terrain, even a fill-in transmitter may emit signals which bleed into an adjacent carrier's service area, particularly along MTA borders, where interference problems will likely be most acute. In addition, as Metrocall notes in its Petition (at 9), interference from intermodulation may result from fill-in transmitters.

^{5/} *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, CC Docket No. 92-115, 9 FCC Rcd 6513, 6519 (1994).

^{6/} In the *NPRM* (at ¶43), the Commission proposed that "regardless of the extent to which their respective service areas are occupied by co-channel incumbents, geographic licensees should be responsible for meeting their coverage requirements."

notification of fill-in transmitters via FCC Form 489 is permitted during the interim period.^{7/}

III. PERMISSIVE MODIFICATIONS ON SHARED CHANNELS

As an operator of paging systems on all CMRS paging bands, ProNet is keenly aware of the disparity between Parts 22 and 90 of the Commission's Rules, and has consistently supported the Commission's efforts towards regulatory parity. The extension of interim permissive modification rights to 929 MHz licensees, using 931 MHz interference contours (R&O at ¶35) is positive step towards this parity. Inexplicably, however, private carrier paging ("PCP") shared channel (150-470 MHz) licensees are still denied the right to make permissive modifications during the interim period.

ProNet agrees with Metrocall that this disparity is unfair to 150-470 MHz PCP licensees. As the Commission itself recognized in the NPRM,^{8/} there is no significant difference between the services provided by PCP licensees and their common carrier paging ("CCP") counterparts. Failure to accord PCP licensees the same relief granted to all other commercial paging providers appears to violate Section 332(c)(1) of the Communications Act, which provides, in pertinent part, that "[a] person engaged in the provision of a service that is a commercial mobile service shall . . . be treated as a common carrier for purposes of this Act."^{9/}

^{7/} Regarding licensee record-keeping requirements, ProNet assumes that Section 22.303 of the Rules continues to apply to all transmitting facilities, including additional transmitters added pursuant to Section 22.165(d), as modified by the *NPRM*.

^{8/} *NPRM* at ¶2, citing Implementation of Sections 3(n) and 332 of the Communications Act, *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988, 8026 (1994).

^{9/} 47 U.S.C. §332(c)(1). This requirement of regulatory symmetry for CMRS, codified
(continued...)

As Metrocall notes (Petition at 8), a simple solution to this disparate treatment of shared PCP licensees is readily available: the Commission can permit these licensees to make permissive modifications using interference contours applicable to Part 22 150-470 MHz frequencies.^{10/}

IV. PERIOD FOR FILING MUTUALLY EXCLUSIVE 931 MHz APPLICATIONS

ProNet also concurs with Metrocall that the Commission should utilize a uniform thirty day Public Notice period for all Part 22 applications during the interim period. The R&O's adoption of a sixty day period for 931 MHz applications perpetuates a confusing, inconsistent policy which disserves the public interest.

Section 22.541 of the Rules establishes a uniform thirty day period in which competing ("MX") applications can be filed. Although the Commission stayed the effectiveness of Section 22.541 for 931 MHz on January 10, 1995,^{11/} its Stay Order was merely a means of preserving the *status quo* for certain 931 MHz grants subject to petitions for reconsideration or applications for review (*i.e.*, to ensure that the petitions would be disposed of under the rules existing when the underlying applications were originally granted). With the pendency of the NPRM, and

^{9/}(...continued)

in §332(c), was established by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI §6002(b)(2)(A), (B), 107 Stat. 312 (1993).

^{10/} The Commission's decision to maintain the shared environment for these PCP channels will not be adversely affected by the relief requested, as operations must still be conducted on an interference-free basis

^{11/} *Order* in CC Docket No. 92-115, 10 FCC Rcd 4146 (1995) ("*Stay Order*").

imposition of interim rules, the Stay Order's rationale no longer applies; there is simply no basis for continuing to apply a disparate Public Notice period for new 931 MHz applications.^{12/}

Eliminating the inappropriate sixty day period for filing mutually exclusive 931 MHz applications will have immediate benefits for the Commission and the public. It will reduce the Commission's processing burden, by limiting the number of MX applications. As a result, it will expedite the licensing process, enabling incumbents to accelerate service improvements. It will also deter speculative MX filings, by limiting the time for application mills to recruit applicants and prepare applications. These objectives are wholly consistent with the Commission's stated objectives in adopting the NPRM and the R&O.

V. 40 MILE EXPANSION BY ASSIGNEES AND TRANSFEREES

Finally, ProNet joins Metrocall's request for clarification of the R&O to confirm that forty mile expansion rights extend to assignees and transferees of authorized stations. While nothing in the R&O suggests that assignees and transferees should be deprived of expansion rights, ProNet agrees that clarification will remove unnecessary uncertainty which could impede capital infusions by investors and by carriers acquiring other systems.

In partially lifting the freeze, the Commission identified the importance of allowing incumbents to "incrementally add transmission sites to better provide service to customers, upgrade to spectrum efficient technology, and compete more efficiently against nationwide

^{12/} Accordingly, continuing use of a sixty day period runs contrary to the Commission's mandate of regulatory parity under §332(c) of the Communications Act.

carriers."^{13/} As part of its aggressive acquisition program over the past several years, ProNet has dedicated considerable resources to achieving these precise objectives. Acknowledging the substantial consolidation currently occurring in the paging industry, the Commission has specifically exempted assignment and transfer applications from the freeze.^{14/} Allowing the assignee or transferee to "step into the shoes" of the former licensee is thus consistent with the Commission's actions and underlying intent in this proceeding; the Commission should explicitly affirm this fact.

VI. CONCLUSION

WHEREFORE, the foregoing premises considered, the Commission should grant Metrocall's Petition for Reconsideration, and modify its R&O, as set forth herein.

Respectfully submitted,

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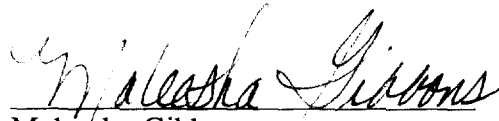
^{13/} *Reconsideration Order* at ¶5, n.11.

^{14/} *R&O* at ¶36, n.74.

CERTIFICATE OF SERVICE

I, Maleesha Gibbons, a secretary in the law offices of Gurman, Blask & Freedman, Chartered, do hereby certify that I have on this 15th day of July, 1996 caused copies of the foregoing "COMMENTS ON PETITION FOR RECONSIDERATION" to be hand-delivered to:

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